

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
CALIFORNIA WATER SERVICE COMPANY	)	FCC File Nos. 0000079079, 0000079084,
	)	0000079277, 0000079282, 0000079294,
For Authority to Provide Multiple Address System	)	0000079302, 0000079321, 0000079326,
Service in the States of California and Washington	)	0000079570, 0000079576, 0000079585,
	)	0000079878, 0000079895, 0000079924,
	)	0000079947, 0000080090, 0000080591,
	)	0000080592, 0000080603, 0000080629,
	)	0000080904, 0000080941, 0000080959,
	)	0000080970, 0000082835, 0000082851,
	)	0000082860, 0000082870, 0000082894 and
	)	0000082905
)	
CITY & COUNTY OF SAN FRANCISCO	)	FCC File Nos. 0000138901, 0000138914,
	)	0000138925, 0000222488 and 0000472773
For Authority to Provide Multiple Address System)	
Service in the Area of San Francisco, California)	
)	
SAN DIEGO GAS & ELECTRIC)	
	)	FCC File Nos. 0000072213, 0000072220,
For Authority to Provide Multiple Address System	)	0000072221, 0000072543 and 0000072547
Service in the Areas of Fallbrook, Escondido, San)	
Clemente, San Juan Capistrano and Vista)	
California)	
)	
CONTRA COSTA WATER DISTRICT)	
	)	FCC File No. 0000083147
For Authority to Provide Multiple Address System)	
Service in the Area of Nortonville, California)	
)	

ORDER

Adopted: June 20, 2002

Released: July 1, 2002

By the Deputy Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On April 9, 2001, the City and County of San Francisco (San Francisco) and California Water Service Company (Cal Water) filed a proposed Settlement Agreement seeking authority to construct and operate Multiple Address System (MAS) stations. For the reasons discussed herein, we dismiss the Settlement Agreement, dismiss five applications filed by San Francisco, and deny San Francisco's Objection to certain Cal Water MAS applications. We also note conflicts between certain Cal

Water applications and granted applications, and direct the Licensing and Technical Analysis Branch (L&TAB) to process Cal Water's applications in accordance with this *Order*.

II. BACKGROUND

2. On January 19, 2000, the Commission streamlined and restructured its MAS rules and procedures.¹ Among its modifications to the MAS service rules, the Commission designated twenty of the forty MAS channel pairs in the 932/941 MHz band for public safety/Federal Government and private internal services, and provided for licensing of these channels on a first-come, first-served site-by-site basis with frequency coordination.² Consequently, beginning on January 20, 2000, an application proposing overlapping operations with one or more applications for 932/941 MHz MAS channels must be filed on the same day to be considered mutually exclusive applications.³ Shortly thereafter four entities, Cal Water, San Francisco, San Diego Gas & Electric (SDG&E) and Contra Costa Water District (Contra Costa) filed applications seeking authorization to operate MAS stations in California.

3. Between January 20 and January 21, 2000, SDG&E filed five applications requesting authorization to operate MAS stations in the areas of Fallbrook,⁴ Escondido,⁵ San Clemente,⁶ San Juan Capistrano⁷ and Vista,⁸ California, respectively. As filed, each SDG&E application was defective because they were filed without the required frequency coordination.⁹ On February 3, 2000, Cal Water filed four applications to operate in the areas of Lancaster,¹⁰ Hawthorne,¹¹ East Los Angeles¹² and Redonda Beach,¹³ California, respectively. Cal Water requested three frequencies in the 932/941 MHz

¹ Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Report and Order*, 15 FCC Rcd 11956 (2000) (*MAS R&O*).

² *Id.* at 11968 ¶ 31, 11971 ¶ 37, 11976 ¶ 53 (designated five of the channel pairs for public safety services).

³ *Id.* See also 47 C.F.R. § 101.101 note 1.

⁴ FCC File No. 0000072213 (filed Jan. 20, 2000).

⁵ FCC File No. 0000072220 (filed Jan. 20, 2000).

⁶ FCC File No. 0000072221 (filed Jan. 20, 2000).

⁷ FCC File No. 0000072543 (filed Jan. 21, 2000).

⁸ FCC File No. 0000072547 (filed Jan. 21, 2000).

⁹ See Automated Return Letter for FCC File No. 0000072213 (dated May 2, 2000); Automated Return Letter for FCC File No. 0000072220 (dated May 2, 2000); and Automated Return Letter for FCC File No. 0000072221 (dated May 2, 2000). FCC File Nos. 0000072543 and 0000072547 were amended by SDG&E before they were returned by L&TAB. See also 47 C.F.R. § 101.103. See e.g. San Diego Gas & Electric Company, *Order on Reconsideration*, 16 FCC Rcd 13089 (WTB PSPWD 2001) (*SDG&E Recon Order*).

¹⁰ FCC File No. 0000079277 (filed Feb. 3, 2000).

¹¹ FCC File No. 0000079302 (filed Feb. 3, 2000).

¹² FCC File No. 0000079576 (filed Feb. 3, 2000).

¹³ FCC File No. 0000079895 (filed Feb. 3, 2000).

MAS band for each station. Cal Water's Lancaster and Hawthorne applications proposed operations that did not comply with the co-channel separation requirements (short-spaced) with respect to SDG&E's San Juan Capistrano application on 932/941.38125 MHz. Cal Water's East Los Angeles application was short-spaced with SDG&E's San Clemente application on 932/941.26875 MHz and with SDG&E's Escondido and Fallbrook applications on 932/941.40625 MHz. Cal Water's Redondo Beach application was short-spaced with SDG&E's Vista application on 932/941.39375 MHz.¹⁴

4. In addition to the four applications mentioned above, between February 2 and February 8, 2000, Cal Water filed twenty-six applications for new MAS stations in the states of California and Washington.¹⁵ On February 17, 2000, Contra Costa filed an application for a new MAS station in the area of Nortonville, California.¹⁶ Contra Costa's Nortonville application was short-spaced with Cal Water's Stockton application on 932/941.28125 MHz.¹⁷ On June 29, 2000, Contra Costa's Nortonville application was granted. Cal Water did not file an objection against the Contra Costa application, nor did it file a petition for reconsideration against the grant of the application.

5. On May 16, 2000, San Francisco objected to seven applications filed by Cal Water to provide service in California.¹⁸ By September 20, 2000, San Francisco filed four applications¹⁹ for MAS licenses even though it recognized that the applications overlapped the seven relevant Cal Water

¹⁴ We note that there were two more Cal Water applications, FCC File Nos. 0000079294 and 0000080603 that were short-spaced with two applications filed by SDG&E, FCC File Nos. 0000072170 and 0000072216. However, that matter was resolved in the *SDG&E Recon Order* and thus will not be discussed here.

¹⁵ See FCC File No. 0000079079 (filed Feb. 2, 2000), FCC File No. 0000079084 (filed Feb. 2, 2000), FCC File No. 0000079282 (filed Feb. 3, 2000), FCC File No. 0000079294 (filed Feb. 2, 2000), FCC File No. 0000079321 (filed Feb. 2, 2000), FCC File No. 0000079326 (filed Feb. 2, 2000), FCC File No. 0000079570 (filed Feb. 3, 2000), FCC File No. 0000079585 (filed Feb. 3, 2000), FCC File No. 0000079878 (filed Feb. 3, 2000), FCC File No. 0000079924 (filed Feb. 3, 2000), FCC File No. 0000079947 (filed Feb. 3, 2000), FCC File No. 0000080090 (filed Feb. 3, 2000), FCC File No. 0000080591 (filed Feb. 3, 2000), FCC File No. 0000080592 (filed Feb. 3, 2000), FCC File No. 0000080603 (filed Feb. 3, 2000), FCC File No. 0000080629 (filed Feb. 3, 2000), FCC File No. 0000080904 (filed Feb. 8, 2000), FCC File No. 0000080941 (filed Feb. 8, 2000), FCC File No. 0000080959 (filed Feb. 8, 2000), FCC File No. 0000080970 (filed Feb. 8, 2000), FCC File No. 0000082835 (filed Feb. 8, 2000), FCC File No. 0000082851 (filed Feb. 8, 2000), FCC File No. 0000082860 (filed Feb. 8, 2000), FCC File No. 0000082870 (filed Feb. 8, 2000), FCC File No. 0000082894 (filed Feb. 8, 2000) and FCC File No. 0000082905 (filed Feb. 8, 2000). We note, however, that FCC File Nos. 0000079585 and 0000082835 were dismissed on May 10, 2001. FCC File No. 0000079585 was dismissed because Cal Water amended the proposed structure height but did not obtain FAA clearance or file FCC Form 854. See Automated Dismissal Letter for FCC File No. 0000079585 (dated May 10, 2001). FCC File No. 0000082851 was dismissed because Cal Water amended the proposed transmitter antenna height and the newly proposed height exceeds the proposed structure height. See Automated Dismissal Letter for FCC File No. 0000082851 (dated May 10, 2001).

¹⁶ FCC File No. 0000083147.

¹⁷ FCC File No. 0000079570.

¹⁸ See Objection to California Water Service Company's Applications for 932/941 MAS Licenses, filed May 16, 2000 (Objection). The applications that San Francisco objected to were FCC File Nos. 0000079079, 0000079282, 0000079326, 0000079878, 0000080904, 0000082851, and 0000082860.

¹⁹ FCC File No. 0000138901 (filed May 24, 2000), FCC File No. 0000138914 (filed May 24, 2000), FCC File No. 0000138925 (filed May 24, 2000), and FCC File No. 0000222488 (filed September 20, 2000).

applications.²⁰ On May 25, 2000, SDG&E amended its five applications to include the required frequency coordination.²¹ All five of the SDG&E applications were granted between August 25, 2000 and October 2, 2000.²² Cal Water did not file an objection against SDG&E's applications, nor did it file a petition for reconsideration against the grant of the applications.

6. On February 7, 2001, the L&TAB returned Cal Water's twenty-nine applications and requested that, within sixty days, Cal Water further justify the need for all of the proposed stations.²³ On April 6, 2001, Cal Water responded to the request for further justification and submitted additional information.²⁴ On April 9, 2001, San Francisco and Cal Water submitted the aforementioned proposed

²⁰ FCC File No. 0000138901 at Exhibit C; FCC File No 0000138914 at Exhibit C; FCC File No 0000138925 at Exhibit C; and FCC File No.0000222488 at Exhibit C.

²¹ See FCC File No. 0000072213, as amended (amended May 25, 2000); FCC File No. 0000072220, as amended (amended May 25, 2000); FCC File No. 0000072221, as amended (amended May 25, 2000); FCC File No. 0000072543, as amended (amended May 25, 2000 and June 26, 2000); and FCC File No. 0000072547, as amended (amended May 25, 2000 and June 26, 2000).

²² FCC File No. 0000072213, as amended, was granted on September 28, 2000; FCC File No. 0000072220, as amended, was granted on September 28, 2000; FCC File No. 0000072221, as amended, was granted on October 2, 2000; FCC File No. 0000072543, as amended, was granted on August 25, 2000; and FCC File No. 0000072547, as amended, was granted on August 25, 2000.

²³ See Automated Return Letter for FCC File No. 0000079079 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079084 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079277 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079282 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079294 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079302 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079321 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079326 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079570 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079576 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079585 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079878 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079895 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079924 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079947 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080090 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080591 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080592 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080603 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080904 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080941 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080959 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080970 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000082835 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000082851 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000082860 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000082870 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000082894 (dated Feb. 7, 2001); and Automated Return Letter for FCC File No. 0000082905 (dated Feb. 7, 2001).

²⁴ See FCC File No. 0000079079 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079084 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079277 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079282 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079294 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079302 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079321 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079326 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079570 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079576 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079585 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079878 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079895 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079924 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079947 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080090 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080591 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080592 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080603 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080904 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080941 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080959 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080970 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000082835 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000082851 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000082860 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000082870 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000082894 at Exhibits A and B (as amended, April 6, 2001); and FCC File No. 0000082905 at Exhibits A and B (as amended, April 6, 2001). (continued....)

Settlement Agreement²⁵ which provided, *inter alia*, the following: (1) Cal Water would withdraw its requests for certain channels in the applications identified in the Objection as well as two additional channels that were not previously disputed;²⁶ (2) San Francisco would withdraw its Objection to Cal Water's applications;²⁷ and (3) the parties would negotiate a short-spacing agreement for service areas proposed in the future by San Francisco that overlap service areas already proposed by Cal Water.²⁸ The agreement also provided that the Settlement Agreement would be null and void in the event the Commission fails to approve it and fails to grant San Francisco's four applications.²⁹

7. On May 24, 2001, San Francisco filed an additional MAS application in the area of San Francisco, California.³⁰ San Francisco acknowledged that the service areas in its application would overlap Cal Water's proposed service areas,³¹ but, as provided in the Settlement Agreement, San Francisco promised to negotiate a short-spacing agreement with Cal Water.³²

III. DISCUSSION

(Continued from previous page) _____

Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079878 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079895 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079924 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000079947 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080090 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080591 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080592 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080603 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080904 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080941 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080959 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000080970 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000082851 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000082860 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000082870 at Exhibits A and B (as amended, April 6, 2001); FCC File No. 0000082894 at Exhibits A and B (as amended, April 6, 2001); and FCC File No. 0000082905 at Exhibits A and B (as amended, April 6, 2001). We note that Cal Water did not amend FCC File No. 0000082835 as requested. Consequently, LTAB dismissed the application on April 30, 2001. See Automated Return Letter for FCC File No. 0000082835 (dated April 30, 2001).

²⁵ See Settlement Agreement: California Water Service Company and the San Francisco Public Utility Commission, (dated Apr. 9, 2001) (Settlement Agreement). On December 31, 2001, the Settlement Agreement was amended to reflect the sharing of only one of the frequency pairs, 932/941.30625. See Settlement Agreement, as amended, (Dec. 31, 2001).

²⁶ See *id.* at 1-2. The previously undisputed channels were requested by Cal Water in FCC File Nos. 0000079282 and 0000080090.

²⁷ *Id.* at 2.

²⁸ *Id.*

²⁹ *Id.* at 2-3

³⁰ FCC File Nos. 0000472773 (filed May 24, 2001).

³¹ See FCC File Nos. 0000079570 & 0000080591. We note that San Francisco failed to report that its application, FCC File No. 0000472773, was also short-spaced with a third Cal Water application, FCC File No. 0000080904.

³² See FCC File No. 0000472773 at Attachment A, Cover Letter.

A. SDG&E and Contra Costa Applications

8. As stated above, four of Cal Water's applications, which were filed in February, 2000, were short-spaced with five SDG&E applications. Ordinarily, the four Cal Water applications would be dismissed as untimely because the SDG&E applications were filed first. However, the January 2000 applications filed by SDG&E were defective because they were filed without the required frequency coordination.³³ On May 25, 2000, SDG&E amended its applications to include the frequency coordination. The Division has previously determined that such amendments are major pursuant to Section 1.929 of the Commission's Rules.³⁴ Therefore, the amended application is treated as a new application thereby initiating a new filing date.³⁵ Consequently, SDG&E's applications should have received a filing date of May 25, 2000 which were untimely with regards to Cal Water's applications. Nevertheless, all five of SDG&E's applications were granted in error. Cal Water did not file a petition to deny the application, a request to set aside the license grant, or a petition for reconsideration of the license grant.

9. Although the SDG&E applications were granted in error, the period to set aside the grants ended on September 25, 2000.³⁶ Section 1.113 of the Commission's Rules provides, "Within 30 days after public notice has been given of any action taken pursuant to delegated authority, the person, panel or board the taking action may modify or set aside it aside on its own motion."³⁷ The Commission has concluded that "the erroneous grant of an application can be corrected *sua sponte* more than thirty days after it becomes final only where the grant was premised upon or contains a ministerial error."³⁸ However, this authority to revisit final actions is limited to the correction of clerical errors that underlie or occur in the process of taking action, such as a mathematical miscalculation, or a license that omits or misstates a frequency, or a document that omits an intended party or provision.³⁹ Furthermore, the Court of Appeals for the D.C. Circuit has stated that granting an application "due to the failure to engage in a comparative evaluation of competing applications," as occurred here, is not the type of error that may be corrected after it becomes final.⁴⁰ Although unfortunate, we do not believe that the grant of SDG&E's applications was the result of a ministerial error. Accordingly, we conclude that we lack the authority to set aside SDG&E's authority to operate in the areas of Fallbrook, Escondido, San Clemente, San Juan Capistrano and Vista, California as these grants are now final.

³³ See 47 C.F.R. § 101.103(d). Section 1.934(d)(1) of the Commission's Rules provides that an application is defective if it is incomplete with respect to informational showings. 47 C.F.R. § 1.934(d)(1).

³⁴ See *SDG&E Recon Order*, 16 FCC Rcd at 13092 ¶ 10.

³⁵ *Id.*

³⁶ See 47 C.F.R. § 1.113 (We note that the 30th day was Sunday, September 24, 2000. Thus, the last day to request reconsideration or for the Commission to set aside the license was Monday, September 25, 2000).

³⁷ *Id.*

³⁸ See *Applications of County of San Mateo, California, Memorandum Opinion and Order*, 16 FCC Rcd 16501, 16504 ¶ 10. (2001).

³⁹ *Id.* ¶ 9.

⁴⁰ *Hirschey v. FERC*, 701 F.2d 215, 219 (D.C. Cir. 1983).

10. As a result, we cannot grant Cal Water's request for frequencies that are short-spaced with frequencies that are authorized to SDG&E. Section 1.934(e)(1) of the Commission's Rules provides that we may dismiss requests for unavailable spectrum if it has previously been assigned to another licensee on an exclusive basis or cannot be assigned without causing harmful interference.⁴¹ Because SDG&E has been assigned to operate on an exclusive basis on spectrum requested by Cal Water, we must dismiss Cal Water's applications for that spectrum. Specifically, Cal Water's applications to operate (1) on 932/941.38125 MHz in the areas of Lancaster and Hawthorne, California; (2) on 932/941.26875 MHz and 932/941.40625 in the area of East Los Angeles, California; and (3) on 932/941.39375 MHz in the area of Redonda Beach, California cannot be granted.

11. Similarly, on June 29, 2000, Contra Costa's Nortonville application was granted while Cal Water's earlier filed Stockton,⁴² San Carlos⁴³ and Dillon Beach⁴⁴ applications for frequency 932/941.28125 MHz were pending. Contra Costa's application was filed nearly two weeks after Cal Water's Stockton, San Carlos and Dillon Beach applications and should have been dismissed as untimely pursuant to Section 1.934(f) of the Commission's Rules.⁴⁵ Because Contra Costa's Nortonville application was granted on June 29, 2000, the last day to set aside the application or request reconsideration of the license grant was Monday, July 31, 2000.⁴⁶ For the same reasons discussed above, this type of error is not ministerial and cannot be reversed after the set aside period has passed. Consequently, Contra Costa has exclusive rights to operate in that spectrum. Therefore, Cal Water's request to operate on 932/941.28125 MHz in the areas of Stockton, San Carlos, and Dillon Beach, California must be dismissed pursuant to Section 1.934(e)(1) of the Commission's Rules.⁴⁷

B. San Francisco Applications and Settlement Agreement

12. Cal Water and San Francisco seek approval of their Settlement Agreement in order to obtain grants of their MAS applications. Section 1.935 of the Commission's Rules permits parties that have filed applications that are mutually exclusive with one or more applications to enter into an agreement to resolve the mutual exclusivity.⁴⁸ Additionally, parties that have filed an informal objection against an application and then seek to withdraw or request dismissal of the objection must obtain the approval of the Commission.⁴⁹ In its Objection, San Francisco requests that the Commission reject the seven applications filed by Cal Water because the applications conflict with MAS applications that San

⁴¹ 47 C.F.R. § 1.934(e)(1).

⁴² FCC File No. 0000079570.

⁴³ FCC File No. 0000079282.

⁴⁴ FCC File No. 0000082860.

⁴⁵ 47 C.F.R. § 1.934(f)

⁴⁶ See 47 U.S.C. § 1.113 (Note that the 30th day was on Saturday, July 29, 2000. Thus the last day was actually Monday, July 31, 2000).

⁴⁷ 47 C.F.R. § 1.934(e)(1).

⁴⁸ See 47 C.F.R. § 1.935.

⁴⁹ *Id.*

San Francisco would soon file.⁵⁰ In the Settlement Agreement, the parties argue that some of the applications submitted by Cal Water are mutually exclusive with applications for four frequency pairs submitted by San Francisco.⁵¹ We disagree with this assessment.

13. In the *MAS R&O*, the Commission stated that the subject MAS channels would be licensed on a first-come, first-served, site-by-site basis with frequency coordination.⁵² Thus, to be mutually exclusive, the relevant applications must have been filed on the same day and must propose operations such that the grant of one application would effectively preclude by reason of harmful electrical interference, or other practical reason, the grant of one or more of the other applications.⁵³

14. Cal Water's applications were received between February 3 and February 8, 2000. San Francisco's applications were not received until May 24, 2000, September 20, 2000 and May 24, 2001, respectively. Accordingly, the San Francisco applications are not mutually exclusive with the Cal Water applications. The San Francisco applications are clearly untimely and must be dismissed as untimely. The Commission will reject settlement agreements that would result in a violation of its rules, absent a showing that a waiver of the pertinent rules is warranted.⁵⁴ The Settlement Agreement provides that Cal Water would withdraw its request for certain channels⁵⁵ challenged in San Francisco's Objection in exchange for San Francisco's withdrawal of the Objection.⁵⁶ Dismissal or withdrawal of Cal Water's applications, however, will not automatically result in license grants for San Francisco. An untimely filed application that is short-spaced with another application does not cease to be untimely if the first-filed application is dismissed or withdrawn after the latter application is filed.⁵⁷ Because San Francisco's applications are untimely with regard to Cal Water's applications, San Francisco's applications must be dismissed regardless of whether Cal Water's applications are granted, dismissed or withdrawn.⁵⁸ If we

⁵⁰ See Objection at 1.

⁵¹ See Settlement Agreement at 1.

⁵² *MAS R&O*, 15 FCC Rcd at 11976 ¶ 53.

⁵³ See 47 C.F.R. § 101.45(a).

⁵⁴ See, e.g., Liberty Productions, a Limited Partnership, *et al.*, *Memorandum Opinion and Order*, 16 FCC Rcd 12061, 12065-67 ¶¶ 10-13 (2001) (settlement agreement rejected because approval would have allowed withdrawal of a winning bid and allow the winning bidder to obtain a license for less than its final bid).

⁵⁵ FCC File No. 0000079079: frequencies 932.31875/941.31875 MHz, FCC File No. 0000079282: frequencies 932.34375/941.34375 MHz, FCC File No. 0000079326: frequencies 932.35625/941.35625 MHz, FCC File No. 0000079878: frequencies 932.25625/941.25625 MHz, FCC File No. 0000080090: frequencies 932.30625/941.30625 MHz, FCC File No. 0000080904: frequencies 932.35625/941.35625 MHz, FCC File No. 0000082860: frequencies 932.25625/941.25625 MHz, FCC File No. 0000082851: frequencies 932.35625/941.35625 MHz.

⁵⁶ See Settlement Agreement at 1-2; see also Letter from John S. Roddy, Deputy City Attorney, to D'wana Terry, Chief, Public Safety and Private Wireless Division, dated May 24, 2001 (Short-spacing Agreement Letter).

⁵⁷ See Plaincom Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 11889, 11891-11893 ¶¶ 6-10 (2000) (*Plaincom MO&O*).

⁵⁸ We also note that if Cal Water withdrew its request for the channels listed in the Settlement Agreement, the spectrum would be available to the first entity that properly filed an application after the withdrawal appears on (continued....)

granted San Francisco's defective applications, San Francisco would receive an unfair advantage over other entities interested in applying for the frequencies in this band.⁵⁹ Accordingly, we will reject the Settlement Agreement because it does not serve the public interest.⁶⁰

15. Finally, the Settlement Agreement provides that San Francisco, subsequent to filing the agreement, would file an additional application that was short-spaced with several Cal Water applications.⁶¹ In order to comply with the Commission's Rules, the parties agreed to enter into a short-spacing agreement with each other.⁶² However, the parties stated that the short-spacing agreement was contingent upon the Commission's acceptance of the Settlement Agreement.⁶³ We have determined that all the channels negotiated in the Settlement Agreement are not available because of grants to SDG&E and Contra Costa, and that San Francisco would receive an unfair advantage with respect to certain channels if the Settlement Agreement were approved. Accordingly, we conclude, based on the circumstances presented, that approval of the Settlement Agreement is not in the public interest. Consequently, because the short-spacing agreement was conditioned on the approval of the Settlement Agreement,⁶⁴ the short-spacing agreement is not effective. Accordingly, we will also dismiss San Francisco's May 24, 2001 application.

C. San Francisco's Objection

16. In light of our rejection of the Settlement Agreement, we will consider the merits of San Francisco's Objection. In its Objection, San Francisco states that Cal Water has applied for a large number of channels that would preclude other utilities in the area from using those station authorizations.⁶⁵ San Francisco also states that it intended to apply for licenses in the same area as Cal Water.⁶⁶ San Francisco argues that the licenses it intends to apply for will serve the public interest better than Cal Water's proposed stations.⁶⁷ Therefore, San Francisco contends that the public interest would be best served by denying several of Cal Water's applications, thereby enabling San Francisco to apply for some of the MAS channels.⁶⁸

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Public Notice. *See Plaincom MO&O*, 15 FCC at 11893 ¶ 9. Therefore, if Cal Water voluntarily withdraws those applications, San Francisco could still acquire the spectrum if it is the first applicant to file a proper application.

⁵⁹ *See Plaincom MO&O*, 15 FCC at 11893 ¶ 10.

⁶⁰ *See Liberty Productions, A Limited Partnership, et al., supra*.

⁶¹ *See Settlement Agreement* at 2.

⁶² *See Short-spacing Agreement Letter*.

⁶³ *See Settlement Agreement* at 2.

⁶⁴ *See id.*

⁶⁵ *See Objection* at 6.

⁶⁶ *See id.* at 1.

⁶⁷ *Id.*

⁶⁸ *Id.*

17. We are not persuaded by San Francisco's Objection. San Francisco does not cite any Commission rule that precludes Cal Water from applying for the amount of MAS spectrum it has requested. In addition, in the *MAS R&O*, the Commission stated that the MAS channels would be licensed on a first-come, first-served basis.⁶⁹ Therefore, San Francisco had the same opportunity to file applications for the MAS spectrum as Cal Water. Furthermore, in response to the Objection, L&TAB requested further justification for the spectrum from Cal Water. Cal Water supplied additional information demonstrating its need for the requested MAS spectrum. San Francisco did not object to Cal Water's further justification.⁷⁰ Therefore, we conclude that San Francisco's Objection should be denied.

18. When San Francisco filed its four applications it conceded that the subject applications were short-spaced with Cal Water's applications.⁷¹ Further, San Francisco filed the subject applications more than three months after Cal Water filed its applications. However, San Francisco stated that it filed the untimely applications knowing they were short-spaced with Cal Water because it had argued in its Objection that Cal Water's applications should be dismissed.⁷² As stated above, we are not persuaded by the arguments set forth in San Francisco's Objection. Therefore, San Francisco's subject applications are dismissed as untimely.

19. Moreover, even if we were persuaded by San Francisco's Objection, the applications filed by San Francisco would still be dismissed because they were defective when filed. As noted above, the dismissal of Cal Water's application would not cure the untimeliness of San Francisco's applications.⁷³ Therefore, we conclude that, pursuant to Section 1.934(f) of the Commission's Rules, San Francisco's applications should be dismissed because they were defective when filed.⁷⁴

IV. CONCLUSION

⁶⁹ See *id.* at 11976 ¶ 53.

⁷⁰ We note that Healthcare Association of Southern California filed an informal objection on May 2, 2001 in response to Cal Water's justification. See Healthcare Association of Southern California, Informal Objection, filed May 2, 2001. We also note that San Diego Gas & Electric submitted a letter stating that it intended to file an Objection and requested that the Commission defer action on Cal Water's applications. See Letter from George Lyon, San Diego Gas & Electric to Mary Shultz, Chief, Licensing and Technical Analysis Branch, dated May 2, 2001. At this time, we have not received an objection from SDG&E. In addition, Healthcare's informal objection was separately denied. See Letter from Ramona Melson, Deputy Chief, Public Safety and Private Wireless Division, to Dennis C. Brown, Esq., Attorney for Healthcare Association of Southern California (dated Jan. 7, 2002).

⁷¹ FCC File No. 0000138901 at Exhibit C; FCC File No 0000138914 at Exhibit C; FCC File No 0000138925 at Exhibit C; and FCC File No.0000222488 at Exhibit C.

⁷² *Id.*

⁷³ See William G. Bowles, Jr., d/b/a Mid Missouri Mobilefone, *Memorandum Opinion and Order*, 61 Rad. Reg. (P&F) 2d 20 (CCB 1986) (Bowles).

⁷⁴ 47 C.F.R. § 1.934(f).

20. Accordingly, we conclude the following: (1) the Objection filed by San Francisco on May 16, 2000 should be dismissed; (2) the applications filed by San Francisco on May 24, 2000, September 20, 2000 and May 24, 2001, are defective and should be dismissed for the reasons discussed herein; and (3) the Settlement Agreement submitted by Cal Water and San Francisco is inconsistent with the public interest and should be denied. We also conclude that to the extent Cal Water's applications are inconsistent with the SDG&E and Contra Costa applications that have previously been granted, those applications must be dismissed pursuant to Section 1.934(e)(1) of the Commission's Rules. We will direct L&TAB to process the Cal Water and San Francisco applications in accordance with this *Order*.

V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and Section 1.935 of the Commission's Rules, 47 C.F.R. § 1.935, the Settlement Agreement: California Water Service Company and the San Francisco Public Utilities Commission, dated April 9, 2001, IS NOT APPROVED.

22. IT IS FURTHER ORDERED that pursuant to Sections 4(i) and 308 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 308 of the Communications Act of 1934 and Section 1.934(f) of the Commission's Rules, 47 C.F.R. § 1.934(f), the following applications filed by the City and County of San Francisco ARE DISMISSED: FCC File Nos. 0000138901, 0000138914, and 0000138925 filed on May 24, 2000, FCC File No. 0000222488, filed on September 20, 2000 and FCC File No. 0000472773, filed on May 24, 2001.

23. IT IS FURTHER ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) of the Communications Act of 1934 and Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, Objection to California Water Service Company's Applications for 932/942 MAS Licenses, dated May 16, 2000 IS DENIED.

24. IT IS FURTHER ORDERED, pursuant to Section 4(i) and 308 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 308 of the Communications Act of 1934 and Section 1.934(f) of the Commission's Rules, 47 C.F.R. § 1.934(f), that the Licensing and Technical Analysis Branch SHALL PROCESS the above-captioned applications filed by California Water Service Company in accordance with this *Order*.

25. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Ramona E. Melson
Deputy Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau